

January 13, 2012

*By Hand Delivery*

Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 204231

231682

RE: STB Finance Docket No. 35517; *CF Industries, Inc. v. Indiana & Ohio Railway, Point Comfort and Northern Railway, and The Michigan Shore Railroad—Petition For Declaratory Order*

Dear Ms. Brown:

Enclosed for filing in the above-captioned case please find an original and ten (10) copies of the Highly Confidential and Public version of the Opening Evidence and Argument on Behalf of American Chemistry Council, Arkema, Inc., The Chlorine Institute, Inc., The Fertilizer Institute and PPG Industries, Inc.

Also included are three (3) CD's each of the Highly Confidential and Public versions of the attached documents.

Enclosed are additional copies of the pleadings for stamp and return. Kindly date-stamp the additional copies for return to this office by messenger.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Jeffrey O. Moreno

Enclosures

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Public Record

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35517**

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**CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT  
AND NORTHERN RAILWAY, AND THE MICHIGAN SHORE RAILROAD—  
PETITION FOR DECLARATORY ORDER**

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**OPENING EVIDENCE AND ARGUMENT ON BEHALF OF  
AMERICAN CHEMISTRY COUNCIL, ARKEMA, INC.  
THE CHLORINE INSTITUTE, INC.,  
THE FERTILIZER INSTITUTE AND PPG INDUSTRIES, INC.**

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**I. PRELIMINARY STATEMENT**

The American Chemistry Council (“ACC”); Arkema, Inc. (“Arkema”); the Chlorine Institute, Inc. (“CI”); The Fertilizer Institute (“TFI”); and PPG Industries, Inc. (“PPG”), hereinafter collectively (“Complainants”),<sup>1</sup> hereby present their collective evidence in the first stage of this proceeding. This evidence consists of: (1) the depositions of RailAmerica employees, James Shefelbine and Harry Shugart, together with those documents submitted to Complainants by RailAmerica in response to discovery that have been attached to those depositions as exhibits; and (2) the Verified Statement of Frank Reiner, the President of CI. The foregoing documents are attached hereto as Attachments A, B and C, respectively. Since the entire discovery record has been designated by RailAmerica as Highly Confidential pursuant to the Protective Order in this proceeding, Attachments A and B will be referred to in this document only in general terms.

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<sup>1</sup> Inasmuch as the identified parties are Complainants in Docket NOR 42129, they are referred to here as Complainants for ease of reference.

As of the date of preparation of this filing, seven operating subsidiaries of the railroad holding company RailAmerica have adopted virtually identical tariff language that requires the movement of toxic-inhalation-hazard (“TIH”) materials by rail to occur in Special Train Service (“STS”).<sup>2</sup> The key element of this tariff requires that all TIH materials move in dedicated trains of no more than three cars that are accompanied at all times by a RailAmerica employee. Although RailAmerica contends that STS enhances the safety and security of TIH transportation, it has not conducted a single analysis to demonstrate that STS provides any such enhancements over the existing comprehensive federal safety and security regulations for TIH transportation or the degree of such enhancements. RailAmerica seeks to justify STS on varying grounds.

On the one hand, RailAmerica states that its subsidiaries such as Alabama Gulf Coast Railway (“AGR”) are really not doing anything other than what is mandated by the Federal Railroad Administration (“FRA”) regulations already in place.<sup>3</sup> Alternatively, RailAmerica argues that STS is necessary to provide additional safety and presumably security over and above those protections imposed under the pervasive and comprehensive regulations of the U.S. Department of Transportation (“DOT”) and the Transportation Security Administration (“TSA”). This alternative claim is made without the slightest demonstration of the need for such “additional” measures, the cost of such measures, or the benefits flowing from such measures.

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<sup>2</sup> RailAmerica has persistently attempted to describe this requirement as “priority train service,” in a transparent attempt to distinguish its tariff from past STS tariffs that have been found unreasonable. Whatever the label, the required service is an unreasonable practice.

<sup>3</sup> See the Response to Complainants’ Supplemental Information in Response to the Board’s Order of September 30, 2011, at pp. 17-8 and attached Verified Statement of James Shefelbine filed October 31, 2011 by SGR and RailAmerica in Docket No. 42129.

Even assuming, *arguendo*, that the STS charges can be justified on a cost basis, the STS program itself must be held unlawful. It is well established that no carrier “has a right to insist upon a wasteful or excessive service for which the consumer must ultimately pay.” *Atchison Railway Co. v. United States*, 232 U.S. 199, 217 (1914), quoted with approval in *Consolidated Rail Corp. v. I.C.C.* 646 F.2d 642, 647 (D.C. Cir, 1981). The internal documents of RailAmerica and its subsidiaries reflect a complete absence of any analysis by any qualified person(s) regarding the costs or benefits of the STS program. At most, the RailAmerica STS program was the result of the “brainstorming” of seven RailAmerica employees following the non-specific orders of the RailAmerica President to make things safer. No objective or quantifiable criteria were employed to attain these non-specific goals and no objective or quantifiable benefits were ascertained or even sought to be ascertained in the process. In short, the STS program was developed on a whim and implemented with a clear view towards how much additional revenue and profit could be obtained for RailAmerica.<sup>4</sup> Such costly and unnecessary services that are sought to be mandated without any justification therefore are plainly contrary to the established law of the Board and its predecessor.

The charges for STS service are as high as \$15,000 per car for movements of as little as 22 miles. RailAmerica internal documents clearly reveal that the extraordinarily high STS charges are based upon a surcharge formula that greatly overstates RailAmerica subsidiary railroad costs while asserting to customers that the charges are necessary to offset those costs. In short, the RailAmerica documents, as well as the deposition testimony of its officials, demonstrate that the STS charges are a subterfuge for a scheme

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<sup>4</sup> In Shefelbine Deposition Exhibit 2 at p. 19, RailAmerica calculates the substantial profits to be generated under the STS program even using unrealistically low STS surcharges and limited numbers of cars.

designed and implemented to greatly inflate RailAmerica profits under the guise of improved safety measures. Such fraudulent misrepresentations have long been held by the Board and its predecessor to constitute unreasonable practices prohibited by 49 U.S.C. § 10702.

Finally, the regulations governing the rail transportation of TIH commodities are comprehensive and have been developed over a nearly 100 year period. The safety regulations developed and implemented by the DOT and the security regulations of the TSA have been fully vetted, reviewed and subjected to public scrutiny. While these regulations continue to evolve with the advent of new technology, and are almost constantly the subject of procedures of the Tank Car Committee of the American Association of Railroads (“AARTCC”) and the DOT and TSA, RailAmerica has never sought to present suggestions for modifications of tank car designs or of railroad operating procedures with respect to TIH materials.

The reason for RailAmerica’s failure to seek regulatory intervention for its perceived safety and security improvements is obvious; none would be imposed or even permitted by the respective Federal agencies charged by Congress with regulating TIH transportation. Those agencies, DOT and TSA, have undertaken exhaustive and comprehensive evaluations of tank car design and operating parameters that RailAmerica’s ad hoc “team” did not consider or even pretend to understand. These evaluations, submitted for public comment and review, are required not only to establish safe and secure operating designs and procedures, but to conduct cost/benefit analyses as well.

RailAmerica claims to justify its STS on the basis of “simple physics.” Although simple, their analysis is not accurate. As is shown by the Verified Statement of Frank Reiner, the President of the Chlorine Institute, and a long-time tank car building engineer, no catastrophic release of chlorine or any other TIH material from a properly designed and constructed rail tank car subject to both the requirements of the DOT and the AAR Interchange Rules, has ever occurred absent some fundamental failure of the railroad moving the tank car to observe basic safety procedures, certainly not including STS. As a result, the elements of STS that RailAmerica would unilaterally impose on TIH shippers have been considered and rejected by the responsible Federal agencies.

The observations of the Court in *Consolidated Rail Corp. v. I.C.C.* 646 F.2d 642, 652 (D.C. Cir. 1981), with respect to STS requirements for nuclear waste, apply with equal force to RailAmerica’s STS requirement for TIH materials:

[RailAmerica has] had and continue[s] to have, ample opportunity to petition both the [TSA] and DOT for review of their respective regulations in this area. Any evidence indicating that significant safety [or security] benefits could be achieved by STS may be considered by DOT and [TSA] pursuant to the procedures each agency has established permitting petitions to issue, amend, or rescind transportation safety [or security] regulations.

The only difference between the nuclear waste STS requirement 30 years ago and the TIH STS requirement today is the fact that TIH transportation has had a much longer history and is much better understood than nuclear waste transportation was in the 1970s. If RailAmerica truly believes that some supplemental train service is required for TIH materials, the path for it to follow is clearly outlined by the Federal agencies with comprehensive regulatory jurisdiction. The refusal of DOT and TSA to adopt STS requirements for TIH movements is conclusive evidence in this proceeding that the STS

requirement is unreasonable, because RailAmerica has not even attempted to demonstrate that STS is not a wasteful or excessive service for which shippers must pay.

## **II. SUMMARY OF THE EVIDENCE**

The evidence presented by Complainants demonstrates three fundamental and indisputable facts: (1) prior to designing and implementing the Special Train Services that are the subject of this proceeding, RailAmerica conducted no analysis of any kind to determine what, if any, benefits would result from the STS program, and, in fact, had no capability to even engage in such an analysis; (2) the only cost analysis performed by RailAmerica was an analysis as to how much additional revenue and additional profit would inure to the benefit of RailAmerica as a result of STS; and (3) rail tank cars approved by the Department of Transportation, and operated under regulations promulgated by both the safety and security regulators of the Departments of Transportation and Homeland Security, are extremely robust, and when operated according to existing regulations have no record of ever suffering a catastrophic release of TIH material. In short, there is no basis whatever for the extremely onerous and costly burdens imposed by STS.

### **A. RailAmerica Discovery**

In his deposition, the leader of the RailAmerica team designated by the RailAmerica President and Chief Executive Officer to put a team together and make “safety” recommendations to RailAmerica subsidiary carriers testified that a team of seven people, with no special safety or security experience, and without the benefit of any outside consultants or experts, essentially stitched together out of whole cloth the STS

program.<sup>5</sup> This team operated without any written instructions or protocols and had no expertise in tank car survivability or the probability of a release from a TIH tank car in the event of a derailment. Their proposal made no effort to analyze the costs versus the benefits of the STS program. Rather, every iteration of the proposal from start to finish emphasized the rates that RailAmerica would charge, culminating in a calculation of the profits that would result from the implementation of STS.<sup>6</sup>

In short, the discovery materials supplied by RailAmerica and the deposition testimony of its executives plainly demonstrate that no real expertise was brought to bear to determine whether the STS proposal actually enhanced safety at all, much less by how much, or whether the supposed risk reduction warranted the substantially higher cost of STS. Indeed, RailAmerica's discovery documents reveal that the only truly detailed analysis performed by RailAmerica was of the cost and profitability associated with the adoption and implementation of STS.

#### **B. Reiner Verified Statement**

In contrast to the total lack of expertise brought to bear by RailAmerica upon its STS proposal, the President of the Chlorine Institute, Inc., possesses extensive qualifications as a rail tank car design and performance expert. Mr. Reiner presently serves on the AAR Tank Car Committee precisely because of his expertise in TIH tank cars. The Tank Car Committee is responsible for making design and performance recommendations to the DOT for incorporation into DOT safety regulations.

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<sup>5</sup> Shefelbine Depo. Tr. at pp.69-73.

<sup>6</sup> Shefelbine Depo. Tr. at pp.53-55 and Exhibit 2 at p. 19.



As Mr. Reiner points out in his Verified Statement (Attachment C), when cars are operated in accordance with those regulations and in accordance with reasonable safety measures, they will not suffer catastrophic failures and releases. Further, Mr. Reiner also points out that there is no logical safety justification for reducing TIH train speeds to the levels reflected in the RailAmerica STS tariff provisions when FRA regulations otherwise permit higher speeds. In fact, he points out that having trains moving at different speeds on the same tracks can cause additional risk rather than reducing risks. This point was also made by RailAmerica subsidiary railroad employees in communications with RailAmerica management.<sup>7</sup> Mr. Reiner also points out that slow moving TIH trains may actually increase security risks. There is absolutely no analysis of this consideration anywhere in the RailAmerica pleadings or the discovery record herein.

### **III. ARGUMENT**

RailAmerica has consistently attempted to make the facially implausible contention that its STS program is not designed to make profits, but merely to recover its costs of providing the service.<sup>8</sup> Whether or not that contention is credible, the issue here is not whether the charges imposed for services performed by RailAmerica's subsidiaries are justified by the cost of providing STS. The issue is whether the Special Train Services that RailAmerica's subsidiaries insist on performing can be justified without any real explanation as to why those services are necessary in the first place.

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<sup>7</sup> Shefelbine Deposition, Exhibit 13.

<sup>8</sup> The Alabama Gulf Coast Railway, for example, publishes a rate of \$15,000 per car for a 22 mile movement from Mobile to Saraland, Alabama, at the same 10 mph speed as its regular train service. Arguing that this is mere cost recovery is absurd.

There is no question that the DOT and TSA have comprehensive authority to establish all manner and means of performing TIH rail transportation services from tank car design and construction to and including rail operating speeds, practices and operations. RailAmerica has made no effort to petition those agencies for any modifications of any rules or regulations that it believes necessary to improve safety or security. The “safety” measures that RailAmerica would impose by tariff have been specifically and categorically rejected by the DOT and TSA. Certainly, safe operating speeds for all rail track segments and with respect to all commodities moving by rail are fundamental in DOT regulations. Car inspection and handling procedures are similarly specified by DOT. Security procedures for hand-off and transfer of custody of TIH cars are specifically set forth in TSA regulations. The DOT and TSA completely occupy the safety and security regulatory realms of rail transportation of TIH materials, including all aspects that RailAmerica purports to “enhance” through STS. Absent some compelling showing that local conditions require additional or different procedures there can be no justification for allowing RailAmerica to institute its own quasi-regulatory regime. RailAmerica has not made any such showing, or even attempted to do so.

The law governing this case is very clear. As the Court held in *Consolidated Rail Corp. v. I.C.C.*, 646 F.2d 642, 648 (1981):

The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected benefit commensurate to their cost; and second, when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit.

The record in this case is equally clear: (1) RailAmerica performed no analysis as to what safety benefits could be expected from its STS measures; (2) although RailAmerica

spent an extensive amount of effort to assess its costs of providing STS in order to determine what rates it should charge, RailAmerica did not perform any analysis as to whether the unidentified safety benefits of STS are commensurate with their cost; and (3) RailAmerica considered no other possible means of achieving those unidentified safety benefits through such means as upgrading their own track or making other safety improvements within their own system. The STS program is an unreasonable practice within the holding in *Consolidated Rail, supra*, and should be prohibited as such.

#### IV. CONCLUSION

In view of the foregoing, the Board should rule that the STS program of RailAmerica and its subsidiary carriers is an unreasonable practice and should be ceased immediately.

Respectfully submitted,

/s/ Paul M. Donovan

LaRoe, Winn, Moerman & Donovan

1250 Connecticut Ave. N.W.

Suite 200

Washington, DC 20036

Telephone: (202) 298-8100

Email: [paul.donovan@laroelaw.com](mailto:paul.donovan@laroelaw.com)

Jeffrey O. Moreno

Thompson Hine LLP

1920 N Street, N.W. Suite 800

Washington, DC 20036

(202) 331-8800

Email: [jeff.moreno@thompsonhine.com](mailto:jeff.moreno@thompsonhine.com)

**Certificate of Service**

I hereby certify that on this 13th day of January 2012, a copy of the foregoing Opening Evidence and Argument on behalf of American Chemistry Council, Arkema, Inc, the Chlorine Institute, Inc., The Fertilizer Institute and PPG Industries, Inc. was served by electronic delivery on all parties of record in these proceedings.

/s/ Jeffrey O. Moreno

**Attachment A**

**Deposition Transcript of James Shefelbine**

**HIGHLY CONFIDENTIAL**

**Attachment B**

**Deposition Transcript of Harry Shugart**

**HIGHLY CONFIDENTIAL**

## **Attachment C**

### **Verified Statement of Frank Reiner**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35517**

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**CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT AND  
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**VERIFIED STATEMENT OF FRANK REINER.**

**I. Qualifications**

**Current Position**

I am currently President of the Chlorine Institute. Prior to that I was Vice President of Transportation and Emergency Preparedness. In both of these positions I served as the Chlorine Institute representative on the Association of American Railroads Tank Car Committee. This Committee has authority/responsibility delegated by DOT to review new tank car designs and to make recommendations to the department regarding packaging specifications.

**Education**

I hold a bachelor's degree in Civil Engineering with a structural concentration from the Illinois Institute of Technology and a Master's Degree in Management from Purdue University. I am a registered Professional Engineer in the State of Illinois.

**Work Experience**

I began work as a structural engineer with General Dynamics Electric Boat Division in 1983 and had assignments of increasing responsibility until leaving the company



to accept a position at Union Tank Car Company in 1989. Union Tank Car is a railroad tank car manufacturing, leasing and repair company based in Chicago, IL. I worked as a Project Engineer with responsibility for structural analysis until 1993 at which time I was promoted to oversee the work of 5 engineers responsible for all new car builds. In 1997 I joined Trinity Industries as Director of Tank Car Development and Engineering Services. In 1998 I rejoined Union Tank Car as Chief Product Engineer which included responsibility for approximately 35 engineers, designers and draftsman. In 2001 I moved to Union Tank Car's Repair Group becoming Director of Shop Operations in 2002 which included operating responsibility for U.S. and Mexican repair facilities with approximately 1200 employees. In 2005 I joined the Chlorine Institute.

#### Tank Car Design Background

Since joining the rail transportation industry in 1989 I have been deeply immersed in tank car design. At Union Tank Car in the Project, Product and Chief Engineer positions I had ultimate responsibility for assuring the structural soundness of all designs. This included learning from service experience. As a large fleet owner and repair operation we were well positioned to observe the entire service life of the railcars. This provided me with significant opportunity for review of older designs and to develop a deep understanding of the service environment. In this role I was involved in industry task groups which oversaw the application of Damage Tolerance Analysis(DTA) to Tank Cars and was responsible for the DTA analysis of the Union Tank Car designs. At Trinity I had the opportunity to oversee those doing analysis not only on tank cars but also on other car types. The assignment at

Trinity helped me develop an even more complete understanding of the rail environment and its effect on different car types and details. At both Trinity and Union Tank I was an active participant on numerous industry design task groups. During my tenure in repair shop operations I had the opportunity to see failures of all types and to oversee the repair/modification process to remedy these failures. Since joining the Chlorine Institute I have been keenly involved in the various efforts to improve the design and performance of chlorine railcars. I served on the external advisory panel to the Dow/UP/UTC Next Generation Rail Tank Car Project. I have served as the lead shipper representative on the Advanced Tank Car Collaborative Research Program. These roles gave me first hand involvement with recent efforts to improve design performance.

#### Experience with Tank Car Failures and Investigations

During my many years of responsibility for the design of and/or repair of a large rail fleet and my significant involvement with industry committees I am not aware of any TIH rail incident involving a major release that was not the result of operational or railroad maintenance failure.

## II. History

Since 2002 there have been 3 major TIH rail accidents that resulted in a significant quantity TIH release. In each of these cases the speeds in question were significantly above the 10 mph suggested by the RailAmerica SOP. In fact, in all three incidents, the trains were operating at speeds in excess of 40 mph Design requirements for pressure car heads include resistance to puncture at speed of impact significantly greater than 10 mph

and we should understand that the impact speed is significantly below the derailment speed due to derailment dynamics which result in deceleration. This leads to the conclusion that the safety need for the RailAmerica SOP has no basis in fact - at least based on car design.

In both cases the accident occurred because of failure to follow DOT requirements and the most basic of safety procedures. It is not apparent how or why limiting the number of TIH cars transported in a consist will improve safety or security. Certainly this is not something that either DOT or TSA has identified as a factor to improve safety or security performance.

The third incident which involved an anhydrous ammonia car was caused by a rail failure. This rail failure is attributable to an inadequate track inspection regimen according to the NTSB. In response to the findings from that incident the FRA adopted enhanced requirements for track inspection plans.

Releases in all three of these incidents would have been averted if the operating railroads were in compliance with DOT regulations and sensible safety procedures. It is not clear what safety advantages would be gained from the SOP that has been outlined.

### III. Regulatory Basis for Design

All tank cars built to transport regulated commodities including all  $\text{Cl}_2$  cars and other TIH cars are fully approved by AAR under authority delegated to it by DOT. All meet the packaging specification requirements developed through the FRA rulemaking process and codified in the DOT regulations. Further, all tank cars are operated under pervasive DOT and TSA regulations. All of these regulations are developed to set an acceptable standard for safety.

A process is in place for any interested party to petition the DOT to amend its regulations should an entity or member of the public have information which could so justify such a change. In fact the AAR Tank Car Committee is charged with making such recommendations if it finds such a change is advisable. DOT has well-established procedures to consider such proposals. RailAmerica has not sought any modifications in tank car design or any changes in operating regulations.

#### IV. Conclusion

Based on my experience and the historical record, TIH tank cars operated in a manner consistent with DOT/TSA regulations and in accordance with reasonable safety measures, will not suffer catastrophic failure. In fact, I am unaware of any such failure ever occurring, without a failure of the rail carrier to observe the regulations and the most basic safety precautions. It is not apparent to me how reducing operating speeds to the level RailAmerica proposes provides any real safety benefits and in fact may reduce safety by putting trains operating at different speeds on the same tracks. Some of the measures proposed or implemented by RailAmerica may in fact raise security concerns. While I am uncertain of the motivation for reducing speeds to 10 mph for TIH cars there is no logical safety justification based on the packaging design.

**VERIFICATION**

I, Frank Reiner, declare under penalty of perjury, that the foregoing statement is true and correct and that I am qualified and authorized to file this statement.

Executed: January 12, 2012

A handwritten signature in cursive script that reads "Frank Reiner".

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**Frank Reiner**